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No. 04-561

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

S. L.,

Petitioner,

v.

PRINCE WILLIAM COUNTY SCHOOL BOARD,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION

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Respondent Prince William County School Board hereby submits this Brief in Opposition to the Petition for a Writ of Certiorari filed by Petitioner S.L., by her mother, Cynthia Lee.

STATEMENT OF CASE

On January 17, 2002, an eligibility committee within Prince William County Public Schools ("PWCPS" or "school system") determined that S.L. was not eligible for special education services pursuant to the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1414(B)(4). (Joint Appendix ("JA"), Ex. K56). This decision was affirmed on February 28, 2002 after a Central Office Review Committee met with the parent and reviewed the determination. (JA, Ex. K67).

Petitioner, by her mother, Cynthia Lee, subsequently requested an administrative due process hearing to appeal the Committee's decision that S.L. was not eligible for special education services. A three day hearing was held in May 2002 before a state hearing officer with testimony presented from seven witnesses. Petitioner and her mother were represented by counsel at this hearing. After the conclusion of the hearing, the Hearing Officer found that S.L. was not eligible for special education services as a child with an other health impairment because the "preponderance of the evidence is that she is not limited by reason of strength, vitality, or alertness, and her sickle cell anemia does not adversely affect her academic performance." (JA, Ex. D, p. 7).

Petitioner and her mother, by counsel, appealed this Hearing Officer's decision to the U.S. District Court for the Eastern District of Virginia on August 16, 2002. After hearing oral argument, the District Court issued a Memorandum Opinion and Order on February 24, 2003 granting the Prince William

County School Board's motion for summary judgment and denying Petitioner's motion for summary judgment. The District Court concluded that the hearing officer's decision that S.L. was not eligible for special education services was supported by the facts presented to him. Specifically, the court held that the hearing officer properly relied on the testimony of seven witnesses and the documentary evidence presented, to conclude that S.L. did not suffer from limited strength, vitality or alertness and that her sickle-cell anemia did not negatively impact her academic performance, entitling her to special education services under the IDEA.

Counsel for Petitioners subsequently claimed that he did not receive the District Court's February 24, 2004 Opinion and Order granting the School Board's Motion for Summary Judgment until March 30, 2003, thirty four days after the Order was entered and the time for appeal had lapsed. Petitioner's counsel also determined at that point that he would no longer represent Petitioner in pursuing this matter.

On July 22, 2003, five months after the District's Order, Petitioner's mother, with a new attorney, filed a motion pursuant to Federal Rule 60(b) with the District Court seeking to set aside that court's Opinion and Order of February 24, 2003. After hearing argument on this motion, the District Court denied the Petitioner's motion on September 8, 2003, because Petitioner failed to meet the threshold requirements under Federal Rule 60(b) to have the previous judgment set aside. Specifically, the District Court found that Petitioner did not present a meritorious defense and the Defendant would be unfairly prejudiced by having the previous judgment set aside.

Petitioner's mother, appearing *pro se*, subsequently filed a motion pursuant to Fed. R. 59 on September 23, 2003, asking the District Court to reconsider Petitioner's 60(b)(6) Motion to Set Aside Judgment. Since this motion was untimely, pursuant to Rule 59, the District Court gave Petitioner the benefit of the doubt and treated her motion as another motion seeking relief from judgment under Fed. R. Civ. P. 60(b). On October 24, 2004 the District Court issued a Memorandum Opinion and Order denying Petitioner's Motion to Reconsider Plaintiff's Motion to Set Aside Judgment Pursuant to Fed. R. 60(b)(6), finding no reason to reconsider its ruling on September 8, 2003 and specifically finding that Petitioner had merely reiterated those arguments which she had previously presented to the court in her earlier motion and still failed to show the requisite elements of a meritorious defense and lack of prejudice to the Defendant.

On October 30, 2003, Petitioner, by her mother, filed a *pro se* appeal of the September 8, 2003 Order to the Fourth Circuit. Since Petitioner failed to properly bring the merits of the case before the Fourth Court by filing a timely appeal pursuant to Federal Rule of Appellate Procedure 4(a)(1)(A) within thirty days after the District Court's February 24, 2003 order, the only issue on appeal to the Fourth Circuit was whether or not the District Court erroneously denied Plaintiff's Motion to Reconsider Plaintiff's Motion to Set Aside Judgment Pursuant to Fed. R. 60(b)(6). After reviewing the record of the lower court and finding no reversible error, the Fourth Circuit by *per curiam* opinion on June 17, 2004, affirmed the District Court's decision to deny Petitioner's Motion to Reconsider Her Previous Motion to Set Aside Judgment. Petitioner then filed a petition for rehearing with the Fourth Circuit, which was denied on July 27, 2004.

It is this June 17, 2004 Order from the Fourth Circuit affirming the District Court's denial of the Motion to Reconsider Plaintiff's Motion to Set Aside Judgment Pursuant to Fed. R. 60(b)(6), that is presented in the Petition for Certiorari to the Supreme Court.

SUMMARY OF FACTS SUPPORTING THE LOWER COURTS' RULINGS

While the administrative record speaks for itself, there are multiple statements in the Petition for Writ of Certiorari that are not supported by the record. Therefore, in accordance with Rule 15 of the Rules of the Supreme Court of the United States, the School Board provides the following summary of facts from the administrative record for the Court's consideration in response to Petitioner's misstatements.

Petitioner, S.L., attended Prince William County Public Schools from kindergarten through her graduation with a standard diploma from Woodbridge High School in 2004 (JA, Ex. K1-2; Petition for Writ). The transfer referenced by Petitioner for the 2001-2002 school year allowed S.L. to remain at Woodbridge High School that year in order to limit stress and anxiety for S.L. (JA, Ex. K 18, 21). S.L. was diagnosed with sickle cell thalassemia at the age of two, but was never found eligible for special education services. (JA, Ex. K 65B; Petitioner's Complaint). Her mother first requested a special education evaluation in 2001 during S.L.'s tenth grade year to determine if she was eligible for special education as a student with an "other health impairment" as defined by 34 C.F.R. 300.7. (JA, Ex. B, p. 49:21-23). On November 1, 2001 a Child Study Committee convened and agreed to complete a full evaluation of S.L., including psychological and educational evaluations. (JA, Ex. K32, 34).

In conformance with the Committee's recommendation for full testing, a psychological evaluation was performed by school psychologist, Dr. Linda C. Ross, an education assessment was performed by education diagnostician, Sherley Channing, and a sociocultural appraisal was performed by school social worker, Michael Kenney. (JA, Ex. 40, 43, and 45.). Dr. Ross's psychological evaluation was conducted over the course of six visits with S.L. As a result of that evaluation, Dr. Ross concluded that S.L. possessed average cognitive skills and found no suggestion that S.L. experienced any processing deficits which had any significant impact upon her academic performance. (JA, Ex K 40.) In addition, as the result of her educational assessment of S.L., Ms. Channing concluded that S.L. was achieving in the average range in all tested areas. (JA, Ex. K43).

Once these evaluations were completed, and teacher educational reports were provided, an eligibility committee, including Dr. Ross, Ms. Channing and the Parent convened to review the available information and evaluation reports, and determined that S.L. was not eligible for special education services pursuant to the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1414(B)(4). (JA, Ex. K35, K56). Specifically, the team found that S.L.'s medically documented health condition did not require instructional accommodations that could not be provided in a regular education setting. (JA, Ex. K56).

While S.L. did not meet the criteria for eligibility under IDEA, the team agreed to develop a child study plan for S.L. to meet her educational needs without requiring special education. The team determined that S.L. might benefit from such things as preferential seating, study guides, and additional time for tests and assignments. (JA, Ex. K59). However, this does not amount to special education services, and does not support the

Parent's argument that special education services were needed. Instead, the listed accommodations are simply instructional strategies and techniques that can be used to provide additional support and assistance to students in a general education setting.

At the parent's request, the child study team reconvened on February 7, 2002 to review the existing child study plan and to make changes as needed. (JA, Ex. K64). The team did not agree to add the accommodations requested by the parent, but did agree to re-evaluate the effectiveness of the existing plan. (JA, Ex. K, 64) Contrary to the parent's representations in this Court, there is no indication in the record that a 504 plan was requested or discussed at this meeting. The team did discuss the teacher education reports that were prepared since the last child study meeting, and they agreed that it was important for S.L. to take more responsibility for her education. (JA, Ex. K63-64). Contrary to Petitioner's representations, these reports indicate that the teacher's primary concern for S.L. was her failure to use her time wisely, to stay motivated, to pay attention and stay on task. (JA, Ex. K63). In addition, while her PE teacher did note low endurance and a short attention span, he also noted that S.L. had an 85% average in his class at the time of this report. (JA, Ex. K65 p. 3). Similarly, S.L.'s orchestra teacher, while noting some fatigue, also noted that no special instructional strategies were needed in that class because S.L. was able to work the same as her peers, without extra assistance. (JA, Ex. K65 p. 9). None of the other teacher reports indicated any concern with fatigue. Also, contrary to Petitioner's representations, S.L.'s child study plan was not retracted at that time.

At the parent's request, a Central Office Review Committee reviewed the eligibility team's decision that S.L. was not eligible for special education services. (JA, Ex. K67). After this review, it was determined that the eligibility decision made on January 17, 2002 should be upheld because S.L. did not require specialized instruction. It was also determined that the current child study plan was appropriate at that time, but would continue to be reviewed. The Principal subsequently reviewed S.L.'s child study plan again on March 12, 2002, and indicated that the plan continued to allow S.L. to make up work when she was not feeling well, to have untimed tests administered in the office, and to have extended time on assignments. (JA, Ex. K 72).

Petitioner, by her mother, subsequently appealed the eligibility committee's decision by requesting an administrative due process hearing, which was held on May 7, May 9 and May 22, 2002. (JA, Ex. A-C). The only issue before the Hearing Officer (and presented in this appeal) was whether or not S.L. was eligible for special education services under IDEA based on her sickle cell disease. (JA, Ex. B, pp. 9-10)

At the time of the administrative hearing S.L. was a fifteen-year-old, tenth grader attending Woodbridge Senior High School. (JA, Ex. K2.). S.L. primarily earned Bs and "Satisfactories" throughout elementary school and through eighth grade. (JA, Ex. K1-2). In her first year of high school and for the beginning of her tenth grade year she received primarily Bs and Cs. (JA, Ex K2). In the eighth, ninth and tenth grades, S.L. also successfully participated in a strenuous extracurricular activity, the school's step team, which conducted practices after school and performed throughout the school year. (JA, Ex. K27, Ex. B p. 81:4-7).

Petitioner's attorney at the hearing presented only two witnesses, S.L.'s mother and Dr. Sohail Rana, a consulting expert who was not S.L's treating physician and had little or no familiarity with S.L., her medical history, her academic records, or her alleged complaints since he had only met S.L. one time, for approximately forty- five minutes to one hour. In contrast, the School Board presented testimony from five (5) school witnesses including Dr. Ross, the school's assistant principal, and three of S.L.'s teachers who saw her on a daily basis in her educational environment. S.L.'s physical education teacher, her biology teacher and ninth grade step-team coach, and her geometry teacher, as well as the school's assistant principal, all presented testimony that they had never heard S.L. complain of fatigue nor observed her appear to be fatigued at school. (JA, Ex. B, pp 138, 152, 177, and 208). Dr. Ross also testified she didn't see any educational detriment due to S.L.'s sickle cell disease. (JA, Ex. B, p. 118:18-20).

As the only expert witness presented by S.L., Dr. Rana did not present any testimony specifically relating any of S.L.'s infections, allergies, enlarged tonsils, or her problem with snoring to her sickle cell disease. Rather, Dr. Rana gave only non-specific testimony regarding the nature of sickle cell disease and the effects it can possibly have on children in general. Similarly, Dr. Rana's records were not made an exhibit for consideration by the Hearing Officer. (JA, Ex A, p. 19; Ex. E). The only exhibits introduced by the Petitioners were Dr. Rana's curriculum vitae, an encyclopedia article on the disease, and two regulations defining the OHI test. (JA, Ex. F). Contrary to Petitioner's representations, the Hearing Officer did not exclude any offered expert testimony or medical records from the hearing.

Other than Ms. Lee's testimony that S.L. had been absent from school for illnesses, there was never any expert testimony or evidence submitted to explain the nature of any of S.L.'s illnesses or to relate those illnesses to her sickle cell disease. Similarly, while Ms. Lee (who was not an expert witness), testified that in her opinion S.L. experienced fatigue related to her sickle cell disease which adversely affected her educational environment, Petitioner did not offer any evidence or even expert opinion to support her argument. Overall, Petitioner did not present any evidence at the due process hearing to support her repeated *arguments* that S.L. suffered effects from her sickle cell disease which caused diminished strength or vitality, or which adversely affected her education.

While S.L. had received periodic evaluations from Dr. Marian Horn, an oncologist with Pediatric Hematology & Oncology of Northern Virginia, Dr. Horn was not called as an expert witness at the hearing. With respect to S.L's complaints of fatigue, Dr. Horn's records, which were introduced by the School Board at the hearing, indicated that S.L.'s "level of hemoglobin should not be causing her to feel fatigued." Dr. Horn also opined in a letter dated February 20, 2002, which was made part of the administrative record, that she was "not convinced that [S.L.] is in need of special education." (JA, Ex. K 65A, K 65B, K 65C). Contrary to Petitioner's assertions, the medical records that were admitted into evidence during the due process hearing by the school system's attorney, did not support the Parent's claim that S.L.'s sickle cell disease impacted her education.

After hearing all of the testimony presented, and reviewing the documents that were properly received into evidence at the hearing, the Hearing Officer issued a seven-

page opinion that clearly set forth a reasoned basis for his decision, including an analysis of the criteria for finding that a child has an "other health impairment" and a review of the testimony presented by all witnesses. (JA, Ex. D). The Hearing Officer did not give undue weight to the testimony of any one witness, and did not exclude any offered evidence from consideration. He considered and accepted the student's medical records, which were offered by the school system, and the testimony of the parent's medical expert, but recognized that no evidence was presented that the student had actually had any of the more substantial symptoms of the disease. Petitioner did not raise the issue of alleged fraudulent testimony with the hearing officer during the course of the hearing. J.A. Ex. K.

Contrary to Petitioner's representations, the Hearing Officer did not conclude that the student's sickle cell disease was incapable of adversely affecting her educational environment. He concluded that in this particular case, based on the evidence presented at the hearing, S.L.'s sickle cell disease did not cause her limited strength, vitality or alertness and did not actually adversely affect her educational performance. Therefore, the hearing officer found that S.L. was not eligible for special education services pursuant to IDEA as a child with an other health impairment. J.A. Ex. D.

Subsequently, Petitioner, by counsel, appealed the Hearing Officer's decision to the U.S. District Court for the Eastern District of Virginia. The only issue raised by Petitioner before the District Court on appeal was whether or not S.L. was eligible for special education services as a child suffering from an "other health impairment" as defined by 34 C.F.R. 300.7. (Plaintiff's Motion for Summary

Judgment pp 1, 4). On Friday, February 21, 2003, Judge Cacheris heard oral arguments upon the parties' Cross-Motions for Summary Judgment. At the parties' agreement, these motions were based solely upon the record of the administrative hearing, with no "other evidence" being offered or admitted at that time. Judge Cacheris then issued a written final order, along with an eleven page Memorandum Opinion on February 24, 2003, in which the Court granted Defendant's Motion for Summary Judgment, denied Plaintiff's Motion for Summary Judgment, affirmed the Hearing Officer's findings, and dismissed the case with prejudice. *See Lee v. Prince William County Sch. Bd.*, Civil Action No. 02-1216-A, Mem. Op. (E.D. Va. Feb. 24, 2003).

Petitioners did not appeal this final decision of the District Court, which upheld the Hearing Officer's determination that S.L. was not eligible for special education services pursuant to IDEA. Instead, five months after this decision, Petitioner, represented by new counsel, filed a Motion to Set Aside Judgment pursuant to Fed. R. 60(b), based on her allegations of excusable neglect and improper exclusion of evidence by an administrative agency. As the basis for the alleged neglect as well as the showing of extraordinary circumstances required to support such a motion pursuant to Fed. R. 60(b), Petitioner relied on her attorney's claim that he had not received the District Court's Final Order until after the appeal period and the attorney's subsequent decision not to represent her in pursuing an appeal in this case. Petitioner also alleged for the first time in these proceedings that the Hearing Officer and the District Court Judge relied on "perjured testimony," as the alleged basis for the requisite meritorious defense. (Plaintiff's Motion to Set Aside Judgment Pursuant to Fed. R. Civ. P. 60(b), p.3).

After hearing oral argument again on September 5, 2003, Judge Cacheris, on September 8, 2003, rendered a decision denying the motion and upholding the previous judgment. *See Lee v. Prince William County Sch. Bd.*, Civil Action No. 02-1216-A, Mem. Op. (E.D. Va. Sept. 8, 2003). Specifically the Court found that while Petitioner's motion was timely in light of the circumstances, she did not present evidence of the requisite meritorious defense. The Court found that the Hearing Officer did not misunderstand S.L.'s health condition, as alleged, Petitioners did not provided any specifics regarding who or when the alleged "perjured testimony" was presented, and had also failed to present this argument to the District Court in their initial appeal. *Id.* at 4-6. The Court also found that any attempt to re-open the case at that time was prejudicial to the Defendant who was entitled to rely on the finality of judgment. *Id.* at 7.

Petitioner, by her mother, appearing *pro se*, subsequently filed a Motion to Reconsider Plaintiff's Motion to Set Aside Judgment Pursuant to Fed. R. Civ. Pro. 60(b)(6) on September 23, 2003, and also requested admission and consideration of "new" evidence for the first time since the administrative hearing. With regards to the offered evidence, Defendant argued that none of the offered evidence was new, but was simply not previously offered by Petitioners when they had the chance to present additional evidence to the District Court. By Memorandum Opinion and Order dated October 23, 2003, the District Court found no reason to reconsider its prior ruling since Petitioner simply reiterated her previous arguments and still failed to meet the requisite requirements of Rule 60(b). *See, Lee v. Prince William County Sch. Bd.*, Civil Action No. 02-1216-A, Mem. Op. (E.D. Va. October 24, 2003). Contrary to Petitioner's representations, while documents were submitted with her motion to reconsider, the District Court did not admit the additional evidence at that time.

REASONS FOR DENYING THE PETITION

A. The Issues Presented are Moot Because the Student Graduated with a Standard Diploma

In accordance with Article III of the U.S. Constitution, the Supreme Court may only decide cases that present an actual controversy for the Court to resolve at the time of the Court's decision. *See Honig v. Doe, et al.*, 484 U.S. 305, 317 (1988) (citations omitted). This alleged controversy must affect the rights of the litigants before the Court. *See DeFunis, et al. v. Odegaard, et al.*, 416 U.S. 312, 316 (1974). For example, the Court has recognized that a student's graduation from school may moot his/her claims since there remains no actual controversy between the two parties. *See, e.g., id.* at 319-320.

In accordance with this requirement, claims brought under IDEA as a general matter, are moot when a student graduates or reaches an age that exceeds the age of eligibility, since the school system is no longer required to provide a free appropriate public education at that point. *Honig*, 484 U.S. at 318 (finding case moot as to one defendant because he is no longer within age limit for eligibility, and finding case not moot as to other defendant who has not yet completed high school). Unless a student is challenging the appropriateness of his/her graduation or is seeking compensatory services that do not amount to payment for college courses, a valid graduation can moot a claim under IDEA of entitlement to a free appropriate public education. *See, e.g., T.S. v. Independent Sch. Dist. No. 54*, 265 F.3d 1090 (10th Cir. 2001), *cert. denied*, 535 U.S. 927 (2002).

In the present case, S.L. admits in her Petition that she graduated from PWCPS with a standard diploma in June 2004. In accordance with IDEA, even if S.L. had been eligible for special education services, she would no longer be entitled to such services. 34 C.F.R. 300.122(a)(3). Petitioner does not claim to be seeking compensatory services, but instead seeks a form of declaratory judgment or injunctive relief. At the time of the initial appeal to the District Court, Petitioner sought a finding that S.L. was eligible for special education services, and this request is repeated throughout her motions in the lower courts, including her Motion to Reconsider Motion to Set Aside Judgment. Therefore, since S.L. has appropriately graduated with a standard diploma, and is not seeking to challenge her graduation or receive compensatory services, the issue presented in this case is moot.

Petitioner claims that this case should survive dismissal because it is "capable of repetition, yet evading review." However, this exception is not applicable to the present case. While the Court may maintain jurisdiction in cases where there is a reasonable likelihood that petitioners will again suffer the same deprivation that gave raise to their claim, that is not possible in the present case. *See, e.g., Honig*, 484 U.S. at 318; *see also DeFunis*, 416 U.S. at 318-20 (finding questions presented were "certainly not 'capable of repetition' so far as he [petitioner] was concerned"); *Bd. of Educ. Of Hendrick Hudson Central Sch. Dist. v. Rowley*, 458 U.S. 176, 186 n.9 (1982) (court maintained jurisdiction because "the alleged deficiencies in the IEP were capable of repetition *as to the parties before it*, yet evading review," because the IEPs each cover only one school year, and because judicial review inevitably takes longer than that to complete) (emphasis added). Specifically, the issue raised in the present case will not be repeated as to this Petitioner. She will not again be in

high school and will not again be evaluated for special education eligibility. Therefore, this exception does not save her claim.

Finally, IDEA by its very nature requires individualized case-by-case review that is extremely fact specific. The cited testimony of Petitioner's own medical expert illustrates why individual fact-based analysis on a case-by-case basis is necessary in the special education context, and specifically, in cases where the student is diagnosed with sickle cell disease since there are many varieties and degrees of severity with this disease. Contrary to Petitioner's claims, the Hearing Officer's determination that S.L. had a mild course of sickle cell disease based on the evidence presented to him, does not mean that all individuals with her form of the disease will necessarily have a mild course. Similarly, there is no indication in the Hearing Officer's decision or in the lower courts' opinions that any one intended such a result. Those cases will require their own individualized, fact-based review.

B. No Important Federal Questions and No Disagreements Among the Circuits or States are Presented for Review

Both of Petitioner's Motions to Set Aside Judgment, as well as her Petition to this Court, are transparent attempts to reargue the facts presented in her case because she disagrees with the findings of fact made by the Hearing Officer who determined that S.L. was not a child with a disability for purposes of IDEA. As indicated in her Petition for Writ, S.L., by her mother, continues to claim that the Hearing Officer erroneously concluded, based on the evidence presented to him, that S.L.'s form of sickle cell disease was mild and did not adversely impact her education. These issues were findings of fact for the Hearing Officer to decide, not

interpretations or conclusions of law. They certainly do not amount to important federal questions requiring review.

Petitioner does not present any disagreement among the circuits regarding any of the issues presented in this case. Additionally, despite Petitioner's representation that the Fourth Circuit decided an important issue of federal law in the present case that should be reviewed by this Court, Petitioner did not specify the question she believes was decided below. Therefore, Respondent is unable to provide a response regarding the importance of any potential question at this time, but asserts that no important federal questions were decided by the Fourth Circuit in this case.

C. The Equal Protection Clause is Not Implicated by Petitioner's Claims

To the extent Petitioner appears to assert violations of the Equal Protection Clause of the Fourteenth Amendment, her arguments on this matter are unclear and do not provide sufficient information for response. However, it is clear that her alleged Equal Protection challenges were not raised in either the District Court or the Fourth Circuit, and, therefore, should not be considered by this Court. *See, e.g., Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 8 (1993) (following general rule that "where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them.") (citations omitted); *see also Heller v. Doe*, 509 U.S. 312, 318-19 (1993) (finding argument regarding application of heightened scrutiny not properly before this Court since argument to District Court and Court of Appeals was that rational basis review applied).

Similarly, Petitioner's claims regarding the Equal Protection Clause are improper in the present case since the allegations are made against the hearing officer and district court judge, not the School Board, who is the Defendant in this case. To the extent Petitioner wishes to assert this claim against these other individuals, such claims should be presented in a separate action with proper service on the proper defendants.

Finally, even if Petitioner was able to assert an Equal Protection challenge at this point, a standard rational basis review would apply since she is not asserting protection as a member of a recognized suspect class for purposes of Equal Protection analysis. Such a review requires merely a showing of a rational relationship between the alleged disparate treatment and a legitimate government purpose. *See Heller*, 509 U.S. at 319-321. While there does not appear to be any actual disparate treatment in the present case, any claimed distinction between the services provided to students with disabilities who are eligible for services under IDEA, and those without such disabilities, would certainly satisfy the rational basis standard.

D. Appeal to the Fourth Circuit was Untimely as to District Court's Affirmance of Hearing Officer's Decision and First Motion to Reconsider, Only Issue Considered by Fourth Circuit and Properly Appealed to this Court was Motion to Reconsider the Denial of the Motion to Set Aside Judgment

The Fourth Circuit properly recognized in its June 17, 2004 Order affirming the District Court's decision, that S.L.'s notice of appeal was untimely as to both the underlying judgment affirming the Hearing Officer's decision, and also as to her first motion to set aside that judgment.

(*See* Appendix B of Petition for Writ). The only issue properly before the Fourth Circuit was S.L.'s appeal of the District Court's denial of her Motion to Reconsider the Denial of Previous Motion to Set Aside Judgment. Therefore, this was the only issue considered and decided by the Fourth Circuit.

In accordance with Rule 13 of the Rules of the Supreme Court of the United States, the petition for writ of certiorari in this case is only timely with regards to the Order entered by the Fourth Circuit on June 17, 2004. In addition, as explained in more detail above, since the Fourth Circuit only decided the issue of the denial of the motion to reconsider the previous motion to set aside judgment, this is the only issue properly before this Court for review. *See Zobrest*, *supra*; *Heller*, *supra*. Similarly, this Court has specifically held that an appeal from denial of a motion under Rule 60(b) does not substitute for an appeal of judgment on the merits and does not bring up the underlying judgment for review. *See Browder v. Director, Department of Corrections*, 434 U.S. 257, 263 n.7 (1978).

Therefore, in accordance with Rule 15 of the Rules of the Supreme Court of the United States, the Defendant objects to consideration of the first question presented by Petitioner regarding the appropriateness of the District Court's decision upholding the hearing officer in the underlying case on the merits. This issue was not timely appealed to the Court of Appeals or to this Court. It is an apparent attempt to have this court review the issues presented in the underlying case, even though this matter is not properly before this Court.

E. The Fourth Circuit Court Of Appeals Properly Affirmed The District Court's Decision to Deny Petitioner's Motion to Reconsider Plaintiff's Motion to Set Aside Judgment

Petitioner's appeal of the District Court's October 24, 2003 denial of her Motion to Reconsider Plaintiff's Motion to Set Aside Judgment was subject to an abuse of discretion standard of review by the Fourth Circuit. *Id.*; *see also United States of America v. Holland, et al.*, 214 F.3d 523, 527 (4th Cir. 2000). Petitioner did not address in her Petition for Writ, or in her appeal to the Court of Appeals, how the District Court abused its discretion in denying her Motion to Reconsider Plaintiff's Rule 60(b) Motion nor in denying Plaintiff's Rule 60(b) Motion itself. Instead Petitioner continues to merely describe ways in which she does not agree with the decisions of the Hearing Officer and the District Court. Petitioner merely reiterates arguments she presented previously and attempts to present evidence which is not part of the record. In effect, Petitioner has attempted to use both her Rule 60(b) Motion and Motion to Reconsider as vehicles to address the merits of her case, since she failed to appeal the District Court's summary judgment in a timely manner.

In support of her Motion to Reconsider Plaintiff's Rule 60(b) Motion and her Rule 60(b) Motion itself, Petitioner relied primarily on the fact that her attorney allegedly did not receive the District Court's initial Order in time to appeal, and on the subsequent fact that her attorney decided not to represent her in pursuing that matter any further. This action by Petitioner's attorney is not sufficient to support a Rule 60(b) motion. In addition, since finality of judgment is a sacred tenet of law and should not be discarded easily, the

Supreme Court has stated that "keeping [a] suit alive merely because Plaintiff should not be penalized for the omissions of his own attorney would be visiting the sins of Plaintiff's lawyer upon the Defendant." *Link v. Wabash R.R. Co.*, 370 U.S. 626, 634 n.10 (1962).

Petitioner's original Rule 60(b) Motion was allegedly based on both Rule 60(b)(1) for alleged excusable neglect, and on Rule 60(b)(6) for alleged improper exclusion of evidence, which was never explained. However, Petitioner failed to meet her burden to demonstrate any grounds to support her claims pursuant to either section of Rule 60. In accordance with the Supreme Court's previous decisions regarding Rule 60(b) motions, Petitioner's allegations are not encompassed by Rule 60(b)(1) because "excusable neglect" does not incorporate a party's failure to file on time because of reasons beyond her control, which is what Petitioner tried to claim in the present case. *Pioneer Investment Services Co. v. Brunswick Associates Limited Partnership et al.*, 507 U.S. 380, 394 (1993). Similarly, Petitioner's claims do not satisfy the requirements of Rule 60(b)(6) because the circumstances in this case do not come close to the "extraordinary circumstances" required to support such a claim. *Klapprott v. United States*, 335 U.S. 601, 613-15 (1949) (finding extraordinary circumstances where individual was stripped of citizenship without evidence or a hearing and without representation of counsel, at a time when the individual was being held in jail with no reasonable opportunity to defend himself).

To the extent Petitioner based her motion upon a claim of improper exclusion of evidence by the administrative agency under Rule 60(b)(6), she failed to identify the evidence that was allegedly excluded, the legal issues to

which the evidence was material, or the basis for her conclusion that the exclusion was improper. Moreover, Petitioner had an opportunity to raise that argument in the District Court as part of her appeal of the decision of the hearing officer. Her failure to do so does not rise to the level of "justifying" relief under Rule 60(b). If a litigant could vacate a Final Order just by claiming that he or she had failed to raise an argument, introduce evidence, impeach a witness, etc., there would be no end to litigation.

Therefore, it was in the sound discretion of the District Court to deny Petitioner's motion to reconsider her motion to set aside judgment. Subsequently, the Fourth Circuit properly upheld this decision for the reasons stated by the District Court. Contrary to Petitioner's unsupported assertions, the Fourth Circuit was not required to issue its own detailed opinion or address each question raised, once it determined that the District Court had not abused its discretion in denying the one motion that was presented on appeal.

F. The District Court Properly Upheld the Hearing Officer's Finding that Petitioner is Not Eligible as a Student with a Disability Pursuant to the Individuals with Disabilities Education Act

The District Court's underlying decision to affirm the hearing officer's finding is not properly before this Court, and Respondent objects to consideration of this question. However, should this matter be considered by the Court, the administrative record shows that the District Court's decision was proper based on the facts presented and applicable federal and state law. Overall, the District Court properly determined that the Hearing Officer's decision "was based on the facts

in the record before him and those facts amply support his conclusion." *See Lee v. Prince William County Sch. Bd.*, Civil Action No. 02-1216-A, Mem. Op. (E.D. Va., February 24, 2003, p.8).

As an initial matter, in accordance with the standard set by this Court in *Rowley*, the District Court properly gave great deference to the Hearing Officer's findings. 458 U.S. at 206 (requiring "due weight" be given to these administrative proceedings). Similarly, the Hearing Officer properly recognized the importance of allowing local educators to exercise their professional judgment when implementing IDEA. These deferential standards are consistent with the Supreme Court's recognition that the provision of IDEA that allows federal courts to review special education decisions, "is by no means an invitation to the courts to substitute their own notions of sound educational policy for those of school authorities which they review." *Id.*

The issue initially presented in this case was whether or not S.L. was eligible to receive special education services under IDEA. Since S.L. did not meet the definition of a "student with a disability" for purposes of IDEA, she was not eligible and therefore, was not entitled to the services and protections provided by the Act. 34 C.F.R. 300.7.

As recognized by the District Court, "contrary to Lee's assertion, however, a diagnosis of sickle cell anemia does not, *ipso facto*, qualify a student for receipt of special education services." *See Lee v. Prince William County Sch. Bd.*, Civil Action No. 02-1216-A, Mem. Op. (E.D. Va., February 24, 2003, p. 6 n.3). There is no dispute in this case that S.L. was diagnosed with sickle cell anemia. However,

having a medical diagnosis does not necessarily mean that the student meets the definition of a "student with a disability" for purposes of IDEA. In order to be eligible under IDEA as a "student with a disability," a student must both be determined to have one of a list of specific disabilities, including "other health impairment," and must require special education as a result of this disability. 20 U.S.C. § 1401(3)(A); 34 C.F.R. 300.7(a). In order to meet the first prong of this test in the category of "other health impairment," the student must have limited strength, vitality or alertness in the educational environment that is due to a chronic health condition (such as sickle cell anemia) *and* that adversely affects the student's educational performance. 34 C.F.R. 300.7(c)(9). If this prong is satisfied, then the student must also require special education to receive some benefit from his/her education in order to qualify as a student with a disability for purposes of IDEA.

Therefore, in order to qualify as a student with a disability, S.L.'s sickle cell disease must have adversely affected her educational performance and required her to receive special education services as a result of the impact of this disease. Based on these requirements of IDEA, the evidence presented to the Hearing Officer in this case did not support a conclusion that S.L. was a student with a disability. Specifically, S.L., although diagnosed with sickle cell anemia, failed to establish that her condition resulted in limited strength, vitality, or alertness which adversely affected her educational performance within the meaning of the IDEA.

No evidence was presented to show that S.L. actually suffered any severe effects as a result of her sickle cell disease. In fact, after reviewing the administrative record, the District Court recognized that Dr. Rana's testimony was

"entirely general" and did not offer any evidence of, "how the disease affected Lee personally." *See Lee v. Prince William County Sch. Bd.*, Civil Action No. 02-1216-A, Mem. Op. (E.D. Va. February 24, 2003, p.7). Similarly, the administrative record shows that S.L. was receiving passing marks, was able to advance from grade to grade in a regular education setting and ultimately to graduate with a standard diploma, without ever receiving special education services. While not necessarily sufficient to prove FAPE, this Court has recognized these factors as important for determining that a student has received educational benefit. *Rowley*, 458 U.S. at 207 n.28.

Finally, while Petitioner does not agree with the Hearing Officer's or the District Court's factual findings, the Hearing Officer is entitled to weigh the evidence presented to him, according to his discretion. As the District Court properly recognized, the Hearing Officer was able to interact with and observe, the live testimony of the school system's witnesses at the due process hearing and was able to weigh their testimony, in addition to the documentary evidence, in order to reach the reasoned conclusion that S.L.'s sick cell anemia did not cause adverse educational impact. The fact that the Hearing Officer did not strongly weigh either Lee's testimony or that of Dr. Rana, does not mean that the Hearing Officer's conclusions were erroneous, or that the respective testimony of these witnesses was "excluded", as Petitioners allege.

G. The Award of Attorney's Fees is Not Proper in this Case

Since Petitioner is not the "prevailing party" in this matter, she is not entitled to attorney's fees in accordance with IDEA. 20 U.S.C. § 1415(i)(3)(b). In addition, even if attorney's fees were permissible, Petitioner is not entitled to recover any fees for the period when she was represented by her mother, appearing *pro se*.

CONCLUSION

For all of the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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